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Via U.S. Mail and Email

Judith L. Miller



**Re: Open Meeting Law Complaint, OAG File No. 13897-449
Incline Village General Improvement District Board of Trustees**

Dear Ms. Miller:

The Office of the Attorney General (“OAG”) is in receipt of your complaint (“Complaint”) filed on or about June 28, 2022, alleging violations of the Open Meeting Law (“OML”) by the Incline Village General Improvement District Board of Trustees (IVGID), during its June 8, 2022 meeting, which may be summarized as follows:

ALLEGATION NO. 1: Prior to the June 8, 2022 meeting, Dr. Mathis developed a new process for General Manager (“GM”) evaluation, which should have been discussed and decided by the Board in the public meeting, not via a serial poll taken by Dr. Mathis.

ALLEGATION NO. 2: At its June 8, 2022 meeting, Dr. Mathis’ discussion of (1) the role of the Board Chair, (2) the role of a Trustee, (3) the Board’s policy limiting the time spent between a certain Trustee and the GM, and (4) Trustee Schmitz’s opposition to Dr. Mathis’s writing of Trustee’s GM Evaluation violated NRS 241.020(2)(d)(1).¹

¹ The Complaint mistakenly cited this section of the Nevada Revised Statute, because there is no subdivision of NRS 241.020(2)(d)(1). The Complainant probably intended to refer to NRS 241.020(3)(d)(1).

ALLEGATION NO. 3: At its June 8, 2022 meeting, the Board of Trustees discussed the health of the character of Trustee Schmitz without advance notice posted on the agenda.

The OAG has statutory enforcement powers under the OML and the authority to investigate and prosecute violations of the OML. NRS 241.037; NRS 241.039; NRS 241.040. The OAG's investigation of the Complaints included a review of the following: (1) the Complaint and all attachments thereto; (2) the response filed on behalf of the Board of Trustees and Declarations by the Board of Trustees; (3) the Video recording of the June 8, 2022 meeting;² and (4) prior OML decisions, case law, and portions of the Nevada Revised Statutes relevant to the Complaints.

After investigating the Complaint, the OAG determines that the Board of Trustees did not violate the OML's clear and complete requirement pursuant to NRS 241.020(3)(d)(1) during the June 8 meeting. Further, the OAG determines that the Board of Trustees did not violate the OML's Notice requirement for the discussion of an individual's character or competence pursuant to NRS 241.020(3)(d)(2).

FACTUAL BACKGROUND

The Board of Trustees held a public meeting on or about January 12, 2022, where the Board of Trustees approved a proposal to have Dr. Bill Mathis develop a new process for the GM evaluations and Board Norms. Dr. Mathis was tasked with a new evaluation process, and he decided to use a new process of "survey questions" for the GM evaluations.

Dr. Mathis determined a series of individual interviews or surveys with the Board of Trustees done via phone conference would best facilitate and expedite the presentation of information for the upcoming evaluation of the GM, Indra Winquest. Dr. Mathis received concurrence from Chair Callicrate on the form of the questions to be asked, who also confirmed the format and process of the evaluation.

After the series of individual surveys, the Board of Trustees held a public meeting on June 8, 2022. Agenda Item H.2 for the June 8 meeting read as follows:

² The OAG reviewed the Board of Trustee's June 8, 2022 meeting at: <https://livestream.com/ivgid/events/10470581/videos/231586131>

H. General Business (for possible action)

2. SUBJECT: Review, discuss, and conduct Incline Village General Improvement District's General Manager Indra S. Winqest Annual Performance Evaluation to Include a possible salary increase (Conducted by Dr. Bill Mathis)

Recommendation for Action: the Board of Trustees review, discuss, and potentially provide a salary increase – **pages 130-159**

During Agenda Item H.2, Dr. Mathis (A) discussed with the Trustees the purpose of the Evaluation and built on the evaluation instrument for the GM Evaluation; (B) introduced Board Norms for the discussion of the GM evaluation and their application; (C) listed goals and issues for 2022 and advised the Board to approve goals as a Board, but stay at the policy level; (D) shared score results with other Trustees on the Board; (E) advised that the Board should only deal with District policies and not operations; (F) advised the Chair should only allow one topic at a time, and not multiple issues at once; (G) informed the Chair was responsible for solving issues of Board conflict; (H) advised the Board should limit interaction with staff and stay in their own lane; (I) advised the Board not micro-manage the GM's time.

Dr. Mathis complimented that all five members were an all-star team, but members needed to stay in their own lane, not run over each other. Further, Dr. Mathis gave each trustee five minutes to comment on his or her experience with the GM, and things that the GM had achieved that each Trustee liked.

Trustee Matthew Dent, Trustee Kendra Wong, and Trustee Michaela Tonking commented that Ordinate 7 was the biggest accomplishment in the past year and the GM's undertaking of the Audit Committee was extremely efficient, but the GM needed to delegate more in the future.

Trustee Sara Schmitz stated that "For the record, I did not write the review contained in tonight's Board packet that has my name attached. I will not agree with it, nor will I defend it... In my many years of writing performance reviews, I have never delegated what I deem to be my responsibility to another person. It appears this is what exactly was done this year, without me understanding Dr. Mathis was intending to write my review of Indra for me... I will not defend this document, but instead, offer to GM Winqest, my time and effort in writing him a complete and accurate review, for which I offer to review with him before sharing it with the Board and public. If he prefers not for this to take place, then my only comment tonight is to state on the

record that I did not write this review, and I do not support what has been written.”

Dr. Mathis responded that “the process that we outlined here, taking materials from board members and writing things down is a timed opportunity because we want to cut back on the amount of time some people took to generate a document. In fact, I received a note from Sara, it said that ‘my mental health is in danger,’ and I have that document, essentially, ‘I can’t do it anymore. Can you just give me more time?’ In fact, when we talked about the choices, between me writing her comments down and having a speedy effort in doing that, she still preferred, she is correct, she still preferred to write her own... It was just a different process, I covered it with Sara very clearly. She wasn’t in agreement, I acknowledge that...”

Chair Tim Callicrate commented that the rating he gave to the GM was 4 to 5. He stated, “Obviously, the FO pipeline, Ordinate 7, and Duffield Foundation regarding the Recreation Center were huge accomplishments. The area of improvement was time management, and delegation of responsibilities.”

Trustee Tonking further asked whether Trustee Schmitz would like to give a score rating, but Trustee Schmitz preferred to abstain from the merit discussion and merit decision because Trustee Schmitz did not feel the review written by Dr. Mathis was a correct reflection. Trustee Tonking confirmed whether the score rating of 2 was an accurate reflection of the GM’s performance, and Trustee Schmitz responded no. Dr. Mathis further explained that the score 2 offered by Trustee Schmitz was in writing, which she wrote to Dr. Mathis during the interview.

Ultimately, the Board proceeded to approve a Salary Increase of 3% for the GM, with all four members approving the amendment and Trustee Schmitz abstained from the voting.

LEGAL ANALYSIS

IVGID is comprised of five (5) trustees and is a “public body” as defined in NRS 241.015(4); therefore, the Board is subject to the OML.

- 1. The Board of Trustees did not violate the OML by using a “Survey Questions/Serial Poll” for the GM evaluation and Board Norms.**

The OML was enacted to ensure public access to government as it conducts the people's business. NRS 241.010. The spirit and policy behind the OML, as with other so-called "sunshine laws" favors meetings to be as open as possible. *McKay v. Board of Supervisors of Carson City*, 102 Nev. 644, 651, 730 P.2d 438, 443 (1986); *Chanos v. Nevada Tax Com'n*, 124 Nev. 232, 239, 181 P.3d 675, 680 (2008) ("[M]eetings of public bodies should be open 'whenever possible' to comply with the spirit of the Open Meeting Law.").

The Complaint alleged that the IVGID Board engaged in "serial polling" for the GM evaluations, practiced by Dr. Mathis, which should have been discussed and decided by the Board in a Public Meeting.

Pursuant to NRS 241.015(3), a meeting means "the gathering of members of a public body at which a quorum is present, whether in person, by use of a remote technology system or by means of electronic communication to deliberate toward a decision or to take action on any matter over which the public body has supervision, control, jurisdiction or advisory power." Deliberation means "collectively to examine, weigh and reflect upon the reasons for or against the action. The term includes, without limitation, the collective discussion or exchange of facts preliminary to the ultimate decision." NRS 241.015(2). The OML is not intended to prohibit every private discussion of a public issue. *Dewey v. Redevelopment Agency of City of Reno*, 119 Nev. 87, 94 (2003). Instead, the OML only prohibits collective deliberations or actions where a quorum is present. *Id.*

The OAG does not possess evidence of serial communication or "collective deliberation" in violation of OML. All five Trustees submitted Declarations stating "Dr. Mathis did not include any discussion of the views of other trustees about Mr. Winqest's performance or proposed process; no other members of the IVGID Board of Trustees were present. Because all the interviews Dr. Mathis had were one on one, the individual meetings did not meet "the simple majority" quorum requirement, defined in NRS 241.015(5).

Finally, the Board of Trustees approved a proposal to have Dr. Mathis develop a new process for the GM evaluations at its January 12, 2022 meeting. The actual process for the GM evaluation is not within the parameters of OML. Therefore, the OAG does not find a violation of the OML in the Board members' conversations with Mr. Mathis.

2. The Board of Trustees did not violate the OML clear and complete requirement at its June 8, 2022 meeting.

An agenda for a meeting of a public body must include a “clear and complete statement of the topics to be considered during the meeting.” NRS 241.020(3)(d)(1). The “clear and complete statement” requirement of the OML stems from the Legislature’s belief that ‘incomplete and poorly written agendas deprive citizens of their right to take part in government’ and interferes with the ‘press’ ability to report the actions of government.” *Sandoval v. Bd. Of Regents of Univ.*, 119 Nev. 148, 154 (2003). Strict adherence to the “clear and complete” standard for agenda items is required for compliance under the OML. *Id.* The OML “seeks to give the public clear notice of the topics to be discussed at public meetings so that the public can attend a meeting when an issue of interest will be discussed.” *Id.* at 155.

Here, the agenda item provided that the Board of Trustees was to “[r]eview, discuss, and conduct [IVGID’s] General Manager Indra S. Winquest Annual Performance Evaluation to include a possible salary increase.” The recommendation was that the Board “review, discuss, and potentially provide a salary increase.” The relationship between the GM and other Board members is crucial to the GM’s performance. Moreover, the discussion of the conflicts and struggles the GM experienced with certain trustees is also within the realm of the GM’s performance. Therefore, it was within the scope of the agendized item. Even though Dr. Mathis briefly discussed the role of the chair and Board norms, and advised the Board should only deal with the district policies and not operations, it was done to advise the Board how to better collaborate with the GM to improve Mr. Winquest’s future performance.

Accordingly, the OAG finds that there was no violation of the OML’s clear and complete standard because the discussion that took place was within the bounds of Agenda Item H.2 which was to evaluate the GM’s performance and potential salary increase.

3. The OAG will not opine as to whether advanced notice was provided to someone other than the Complainant.

Complainant does not have standing to challenge whether another person was provided adequate notice under the OML. The OML requires specific notice to be given to individuals whose character, alleged misconduct, or physical or mental health will be discussed during the meeting. NRS 241.033. In addition, the OML requires specific notice to be given to individuals if the public body intends to take administrative action against them. NRS 241.034. The OAG has previously opined that the subject of a meeting may waive this statutory right to notice. *In re Douglas County Board of Commissioners*, Open Meeting Law Opinion No. 13897-312 (Oct. 2, 2019).

The question of standing concerns whether the party seeking relief has a sufficient interest in the matter. *Nevada Policy Research Institute, Inc. v. Cannizzaro*, 507 P.3d 1203, 1207, 138 Nev. Adv. Op. 28 (2022). To establish standing, a complainant must have suffered some actual or threatened injury resulting from the challenged activity. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). To sue in a district court to have an action of a public body declared void or require compliance with or prevent violations of the OML, a person must have been denied a right conferred by the OML. NRS 241.037(2).

Here, the Complaint asserts that the Board of Trustees violated NRS 241.033 at its June 8, 2022 meeting because the health and character of Trustee Schmitz were mentioned and discussed by Dr. Mathis. The OAG finds that Complainant does not have standing to challenge the sufficiency of notice to another person and will not further opine on the matter.

CONCLUSION

Upon review of your Complaint and available evidence, the OAG has determined that no technical violation of the OML has occurred. However, the OAG cautions the Public Bodies to be cognizant of the spirit and policy behind the OML and to make efforts to further that spirit at their meetings. The OAG will close the file regarding this matter.

Sincerely,

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Attorney General

By: /s/ ZIWEI ZHENG
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Deputy Attorney General

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